Guo Xiang Yang v Friendly Oriental Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–472 OF 1998
KAMALANATHAN RATNAM J
7 SEPTEMBER 2000

Civil Procedure *— Pleadings — Amendment of statement of claim — Application to add third defendant and for leave to serve writ out of jurisdiction — Matters forming subject of amendment within knowledge of plaintiff — Duty of court — Whether should be allowed — Rules of the High Court 1980 O 15 r 6(2)(h) & O 20 r 5(1)*

The plaintiff was a businessman from China. The plaintiff's lawyer in Singapore ('Tang') had persuaded the plaintiff to join him to buy properties in Johor Bharu for development purposes by taking shares in Malaysian companies which would then purchase the properties. The plaintiff sent monies to the account of Tang. Both the defendants bought properties with the monies remitted by the plaintiff. It was agreed between the parties that the monies would be refunded to the plaintiff upon the sale of the properties with 10% interest from the time of each advance. The plaintiff claimed there had been a breach of those agreements in that no shares have been allotted to him. The plaintiff applied by summons pursuant to O 15 r 6(2)(h) of the Rules of the High Court 1980 ('the RHC') to amend the writ and statement of claim by joining Tang as the third defendant and for leave to serve notice of writ out of jurisdiction and for the regulation of the entry of appearance by Tang (who is residing in Melbourne). The defendant's counsel argued that it was improper to make this application after the defence had begun its cross-examination. It was also argued that all matters that form the subject matter of the amendment were well within the knowledge of the plaintiff and that therefore the present application being unusual ought not to be allowed.

Held, allowing the application:

Order 20 r 5(1) of the RHC allows for amendment at any stage of the proceedings (see p 828H). All that the plaintiff was seeking to do was to have all the relevant parties, who would be able to throw light into this case, to attend court so that the trial would lead to a decision of the real issue in controversy. The object of the court is to decide upon the rights of the parties and not to punish either side for mistakes they make in the conduct of their case. The order granting leave to amend had not breached any of the stringent tests laid out by the Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (see p 829C–D).

[Bahasa Malaysia summary

Plaintif merupakan ahli perniagaan dari China. Peguam plaintif di Singapura ('Tang') telah meyakinkan plaintif agar membeli hartanah

di Johor Bahru bersamanya bagi tujuan pembangunan dengan mengambil saham di syarikat-syarikat Malaysia yang kemudiannya akan membeli hartanah tersebut. Plaintif mengirim wang ke dalam akaun Tang. Kedua-dua defendan membeli hartanah tersebut dengan wang yang dikirim oleh plaintif. Adalah dipersetujui di antara pihak-pihak bahawa wang tersebut akan dikembalikan kepada plaintif setelah hartanah tersebut dijual dengan faedah 10% dari masa setiap bayaran terdahulu. Plaintif mendakwa bahawa terdapat kemungkiran perjanjian iaitu tiada saham diperuntukkan kepadanya. Plaintif memohon melalui saman menurut O 15 r 6(2)(h) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk meminda writ dan pernyataan tuntutan dengan bergabung dengan Tang sebagai defendan ketiga dan untuk kebenaran menyampaikan notis writ di luar bidang kuasa dan untuk mengawal kemasukan kehadiran Tang (yang bermastautin di Melbourne). Peguam defendan berhujah bahawa adalah tidak betul membuat permohonan tersebut selepas pihak pembela telah memulakan pemeriksaan balas. Adalah juga dipertikaikan bahawa semua perkara yang membentuk isi perkara pemindaan tersebut memang dalam pengetahuan plaintif dan oleh itu, permohonan tersebut, kerana sifatnya yang luarbiasa, tidak patut dibenarkan.

Diputuskan, membenarkan permohonan tersebut:

Aturan 20 r 5(1) KMT membenarkan pindaan pada apa sahaja tahap prosiding (lihat ms 829H). Plaintif cuma inginkan semua pihak yang relevan, yang dapat memberikan keterangan dalam kes ini, hadir di mahkamah supaya perbicaraan tersebut akan memutuskan isu sebenar dalam kontroversi. Matlamat mahkamah adalah untuk memutuskan hak-hak pihak-pihak dan bukannya untuk menghukum mana-mana pihak bagi kesilapan yang telah dilakukan dalam pengendalian kes mereka. Perintah memberikan kebenaran meminda tersebut tidak melanggar mana-mana peraturan ketat yang ditetapkan oleh Mahkamah Persekutuan dalam *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (lihat ms 829C–D).]

Notes

For cases on amendment of statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3458–3460.

Cases referred to

Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 6(2)(h), O 20 r 5(1)

A *Abdul Razak Ahmad* (*Adbul Razak Ahmad & Associates*) for the appellants.

Lim Chor Pee (*MS Ong* and *Peter Yap*) (*Chor Pee Anwarul & Co*) for the respondent.

Kamalanathan Ratnam J:

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Facts

The plaintiff is a businessman from China and he only understands Mandarin and doesn't understand English. He came to Singapore and had business interests there and became the managing director of a joint-
C venture company. He came to know a Singapore lawyer, Tang Liang Hong ('Tang'), who is well versed in the Chinese language. Tang became the plaintiff's lawyer in Singapore. Tang persuaded the plaintiff to join him to buy properties in Johor Bharu for development purposes by taking shares in Malaysian companies which would then purchase the properties. Towards
D this end, both signed a number of agreements in the Chinese language. They were not well drafted legal documents as such, but they purported to spell out the terms of the investments in Johor. Generally, both parties were to have shares in the Malaysian companies. The plaintiff sent monies to the account of Tang. Both the defendants bought properties with the monies remitted by the plaintiff. However, no shares were allotted at all to the
E plaintiff. In the meantime, Tang had political problems in Singapore and he was being investigated by the Special Branch and the Inland Revenue Authorities ('IRA') in Singapore. Tang took the plaintiff to Johor to view the said properties prior to purchase. The plaintiff complained to Tang that he was not allotted shares. As proof that he had carried out the purchase in the name of the two defendant companies, Tang himself handed the
F original titles of the properties belonging to the defendants, to the plaintiff. Subsequently, the parties met in China where another supplementary agreement was drawn up whereby it was agreed between the parties that the monies would be refunded to the plaintiff upon the sale of the properties with 10% interest from the time of each advance. In the course of the investigations by the IRA of Singapore into Tang's affairs the IRA took
G statements from the plaintiff, who had to explain his business relationship with Tang. The IRA has now taken possession of the title deeds. The plaintiff claims there has been a breach of those agreements in that no shares have been allotted to him. The plaintiff also claims that there is a resulting trust in his favour since both the defendants are two-dollar companies.

H The defence is that Tang had no authority to enter into the agreement on behalf of the two companies and that even if he had, the second agreement entered into in China, was made under duress.

Findings of the court

I I then case managed this trial on numerous dates and fixed it for hearing on 3 August 1999. On that date, En Razak for the defendants applied to amend his defence. With the plaintiff having no objections, I granted an order in

terms. Before the trial commenced, En Razak informed the court that Tang is presently residing in Melbourne and that to his knowledge he is blacklisted by the Malaysian Immigration Department and would not be able to come to Malaysia and thereby testify at this trial. En Razak conceded that Tang was the main witness in this case. Since Mr Chor Pee, counsel for the plaintiff, did not apply for an adjournment to amend his pleadings, I proceeded with the trial. The plaintiff then testified and, in the midst of his cross-examination, his counsel applied by summons pursuant to O 15 r 6(2)(h) of the Rules of the High Court 1980 ('the RHC') to amend the writ and statement of claim by joining the said Tang as the third defendant and, for consequential orders such as, for leave to serve notice of writ out of jurisdiction and for the regulation of the entry of appearance by the said Tang.

The application

It was the case of the plaintiff that it was necessary to bring in Tang as a third defendant to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. The application was also necessary to include facts pertaining to the third defendant's involvement in the case. The plaintiff argued that the defendants would not be prejudiced by the said application in such a manner, which cannot be compensated for, with costs. It was also pointed out that the plaintiff's cause of action against the proposed third defendant was not time-barred and that the plaintiff did indeed have a good cause of action against him.

The main thrust of the objection to this application by the defence was that it was improper to make this application after the defence had begun its cross-examination. It was also argued that all matters that form the subject matter of the amendment were well within the knowledge of the plaintiff, and that therefore the present application being unusual, ought not to be allowed.

I am unable to agree with En Razak. Whilst there is no doubt in my mind that the plaintiff knew all these matters even before the commencement of the trial, it was only on 3 March 1999 that the plaintiff was made aware that the elusive Tang would not appear, or that there was a strong possibility that he might not appear to testify. Whilst En Razak ought to be commended for not springing a surprise on the plaintiff by not calling the said Tang as a witness, I was surprised by Mr Chor Pee's desire to continue with the case on 3 August 99 without applying at that stage to amend. In fact if I recall, Mr Chor Pee insisted that the matter ought to proceed.

Order 20 r 5(1) of the RHC allows for amendment 'at any stage of the proceedings'. I cannot however take the conduct of Mr Chor Pee as a waiver of his right to add Tang as a co-defendant, nor can I, in all good conscience, treat his conduct as an estoppel. En Razak has himself conceded on the day of the trial that Tang is a key player in this case. Since he has said that he is in no position to be able to subpoena Tang to court, then I must, in all

fairness and in the interest of justice, allow the plaintiff to en-join Tang as a co-defendant. Knowing that Tang is a key player in this case, I cannot discount the possibility of the plaintiff assuming that Tang would most certainly be called by the defence. Since En Razak had given notice on the day of the trial, the new counsel appearing for the plaintiff has now seen it necessary to have Tang in court by enjoining him as a co-defendant to ensure his attendance. Whether the plaintiff will be successful in getting Tang to enter Malaysia is another issue assuming Tang is indeed blacklisted by the Immigration. The plaintiff has not sought to introduce any new facts, since even the defence concedes that all the facts adduced in respect of the amendment were already within the knowledge of the plaintiff. In my view all that the plaintiff is seeking to do is to have all the relevant parties, who would be able to throw light into this case, attend court so that the trial would lead to a decision of the real issue in controversy. I must bear in mind that the object of the court is to decide upon the rights of the parties and not to punish either side for mistakes they make in the conduct of their case. Besides, it is my practice to give leave to amend unless I am satisfied that the party applying was acting male fide or that his conduct was such that allowing the application to amend could not be compensated for by an order of costs made against him. I am satisfied that my order granting leave to amend has not breached any of the stringent tests laid out by the Federal Court in *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213. I therefore granted an order in terms of the prayers sought. However, in the exercise of my discretion, I allowed costs to the defendant in any event, which the parties agreed to at RM1,000.

Application allowed.

Reported by Benjamin Yong